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No. 81-

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

Petitioner,

— *v.* —

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can an employer be found liable under 42 U.S.C. § 1981, absent a finding that such employer acted with an intent to discriminate?

2. Does an employer violate 42 U.S.C. § 1981 by the mere acceptance of workers from a discriminatorily-operated union hiring hall without regard to whether the employer knew, or should have known, of the union's discrimination and without regard to whether such union discrimination, in fact, had an adverse impact on the composition of that employer's workforce?

3. Can a class of 1,400 individual employers be held vicariously liable under 42 U.S.C. § 1981 solely by reason of a union's intentional discrimination in the operation of its hiring hall, where the district court found that (1) the employers were required to use the hiring hall by the terms of their collective bargaining agreements, (2) the hiring hall provisions set forth in the agreements were nondiscriminatory on their face, (3) there was no evidence that the employers knew, or should have known, of the discrimination being practiced by the union, and (4) the hiring hall was operated under the exclusive control of the union?

4. Did the court below properly enter a broad mandatory injunction, including mandatory quotas, against each of 1,400 employers without affording them an opportunity to present their individual defenses or individual employment statistics?

5. Was a defendant subclass of 1,400 employers properly certified under subdivisions (a) and (b)(2) of Federal Rule of Civil Procedure 23?

6. Did the district court secure *in personam* jurisdiction over 1,400 unnamed members of a defendant class through the device of a defendant class action?

PARTIES IN THE COURT OF APPEALS

This case was one of five appeals arising out of a single district court action. The appeals were consolidated below by the Court of Appeals. The parties to the consolidated proceedings in the court of appeals were:

Plaintiff-Appellees

(a) the Commonwealth of Pennsylvania, and

(b) twelve individuals, on their own behalf and as representatives of a class of similarly situated individuals.

Named Defendant-Appellants

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: Contractors Association of Eastern Pennsylvania, General Building Contractors Association, Inc., United Contractors Association, and Pennsylvania Excavating Contractors Association, on behalf of themselves and as representatives of a defendant class of employer associations, (all but the the last named association are separate petitioners before this Court);

(d) Glasgow, Inc., on behalf of itself and as representative of a defendant class of employers; (a separate petitioner to this Court).

Nonparty-Appellants

Two unnamed members of the defendant employer class also filed timely appeals:

(a) Bechtel Power Corporation, petitioner here; [1] and

(b) United Engineers & Constructors Inc. (a separate petitioner to this Court).

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1 Pursuant to Supreme Court Rule 28.1, Bechtel Power Corporation states that it is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation. Bechtel Power Corporation has no subsidiaries that are not wholly-owned. Affiliates of Bechtel Power Corporation are Bechtel Petroleum, Inc. (which has several wholly-owned subsidiaries); Bechtel Civil & Minerals, Inc. (which has several wholly-owned subsidiaries); Bechtel Investments, Inc.; and the following independent affiliates of Bechtel Group, Inc.: Becon Construction Company, Inc., and its subsidiary E & F Construction Specialists, Inc.; Dual Drilling Company; Bechtel International Corporation; Bechtel Eastern Limited; Bechtel International Constructors, Inc,; Bechtel & Associates; Bechtel Associates Professional Corporation; Bechtel Associates Professional Corporation, (D.C.); Bechtel Associates Professional Corporation, (Ohio); Bechtel Associates Professional Corporation, (Virginia); Bechtel Equipment; BICA, S.A.deC.V.; Saudi Arabian Bechtel Equipment Co., and Sequoia Ventures, Inc., and its wholly-owned subsidiaries.

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BECHTEL POWER CORPORATION,

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COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bechtel Power Corporation petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

OPINONS BELOW

District Court

The opinion of the District Court for the Eastern District of Pennsylvania, setting forth findings of fact and conclusions of

law on issues of liability (A 9),[2] is officially reported at 469 F. Supp. 329. The district court also entered a separate Judgment and Decree, accompanied by a Supplemental Opinion. The Judgment and Decree (A 228) is not officially reported; the Supplemental Opinion (A 213) is officially reported at 488 F. Supp. 988.

Court of Appeals

Consolidated appeals were initially heard by a panel of the Third Circuit Court of Appeals. Before a decision was issued, however, the court ordered reargument en banc. The judgment of the district court, to the extent challenged by Bechtel Power Corporation, was thereafter affirmed by an equally divided court. The opinion of the court (A 4) is officially reported at 648 F.2d 923.

JURISDICTION

The judgment of the court of appeals was entered May 19, 1981 (A 1), following reargument. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Civil Rights Act of 1866, as codified at 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as

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2 A joint appendix has been separately printed and submitted in support of this petition and the related petitions of United Engineers & Constructors Inc., Glasgow, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and General Building Contractors Association. Reference to the joint appendix will be made as "A". followed by the appropriate page number.

is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Subdivisions (a) and (b) of Federal Rule of Civil Procedure 23 provide:

> (a) Prerequisites to a Class Action.
> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable.
> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

An evenly divided court of appeals, sitting en banc,[3] affirmed a district court decision which (1) held some 1400 individual members of a defendant-employer class vicariously liable under 42 U.S.C. §1981 for a union's acts of intentional discrimination, and (2) subjected the employers to an extensive mandatory injunctive decree. Bechtel Power Corporation ("Bechtel"), the Petitioner and an unnamed member of the defendant-employer class, seeks review of the court's decision.

General Background

The action was filed in the district court in 1971, the principal allegation being that Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union") had operated its hiring hall in a racially discriminatory manner. Plaintiffs were the Commonwealth of Pennsylvania, in its capacity as *parens patriae*, and twelve individual black operating engineers, who subsequently were certified as representatives of a class of over one thousand minority persons residing within Local 542's jurisdiction.

Named defendants were Local 542 and the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware ("JATC"). Also named as defendants were four employer associations ("the associations") and a single contractor, Glasgow, Inc. ("Glasgow"). The associations were certified by the district court as representatives of a defendant subclass of all

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3 Chief Judge Seitz and Judges Aldisert, Gibbons, Hunter, Weis, and Garth sitting; Judges Rosenn, Adams, Sloviter, and Higginbotham did not participate.

employer associations which had been parties to a collective bargaining agreement with Local 542 during the appropriate limitations period.

Glasgow was certified as the representative of all employer parties to collective bargaining agreements with Local 542 who had hired at least one operating engineer affiliated with the local during the relevant limitations period. The court estimated there were approximately 1400 members of this defendant-employer subclass[4] (A 14).

Bechtel is one of the unnamed members of the defendant-employer class. It was never served with process nor did it participate in the district court proceedings below.

Plaintiffs' Allegations As to Liability

In the complaint, the Union and JATC were alleged to have violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and 42 U.S.C. § 1981 ("§ 1981"). Because Title VII's administrative prerequisites had not been met as to the employer class (no charges were filed against the employers with EEOC, nor did they participate in the required conciliation procedure), the liability of the employer class could only be grounded in an alleged violation of § 1981.

Finally, plaintiffs alleged a conspiracy among the 1400 contractors and the Union, in violation of 42 U.S.C. §1985 (3).

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4 Issues concerning the subclass of employer associations are not discussed in this petition. References hereafter to the "defendant class" or "employer class" refer to the employer subclass and not the association subclass.

The Decision of the District Court

Prior to trial, the district court directed that the action be conducted in two stages: Stage I to consider liability and Stage II, damages. At the conclusion of Stage I, the court found that Local 542 and JATC had violated both Title VII and § 1981 by intentionally discriminating on the basis of race in both membership as well as referrals for work from the hiring hall. These findings were affirmed by the court of appeals, and Bechtel does not challenge them here.

The district court's opinion on the liability issue is lengthy, and the findings of fact regarding the Union, JATC, and the associations extensive. Findings related to the employers - and, therefore, to the issues Bechtel raises here - are few. They include findings that:

> (1) the hiring hall agreement to which the employers agreed is facially neutral and nondiscriminatory (A 30);
>
> (2) the Union's discriminatory referrals were in derogation of, rather than pursuant to, the hiring hall agreement (A 120, A 186);
>
> (3) the employers did not know, and had no reason to know, of the Union's discriminatory acts (A168, A 195, A 198); and,
>
> (4) plaintiffs failed to prove that the defendant-employer class acted at any time with discriminatory intent (A 195).

Equally significant are the findings that do not appear in the decision below. For example, there is no finding that any individual unnamed contractor, much less the class of 1400 contractors, engaged in any act of discrimination. Nor is there any finding concerning the extent of minority representation in the individual workforce of any unnamed employer class member.

Despite the foregoing, the court held that each member of the employer class was vicariously liable for the Union's acts of intentional discrimination - without any finding of intent or knowledge on the part of the employer class or its individual

members (A 168). In fact, the court expressly rejected the notion that discriminatory intent was a necessary element of a cause of action under § 1981 (A 167).

Finally, the court held that plaintiffs had failed to prove their §1985 (3) conspiracy claim (A 196 – A 198).

The Stage I Decree

In its Stage I judgment and decree ("the decree") (A 228), based upon its findings regarding the available minority workforce, the district court established membership quotas for Local 542 and JATC (A 236, A 244), and directed the Union to meet minority quotas in its work referrals to employers (A 236). The court went on to impose minority employment quotas upon the employers as well – totally without regard to the availability of minorities through the hiring hall (A 241 – A 244). Each contractor was required to periodically prepare and file special reports (A 248) listing employment data by individual minority and for its total workforce. Special minority training programs were also required of the employer class, although no findings were made that the employers had previously provided training to non-minorities (A 247 – A 248).

The Decision of the Court of Appeals

Following final amendment of the decree, several parties, including Bechtel, filed timely appeals in the Court of Appeals for the Third Circuit. The appeals were consolidated, and argument was ultimately heard, en banc. The court issued two judgments on May 19, 1981. As to the liability of the Union and JATC, it unanimously affirmed the judgment of the district court. As to the liability of the employer class, the court divided evenly, thereby affirming the district court (A 1, A 8). It is to review this latter judgment that Bechtel now seeks certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT WHICH NOW EXISTS AS TO WHETHER DISCRIMINATORY INTENT IS A NECESSARY ELEMENT OF A VIOLATION OF THE CIVIL RIGHTS ACT OF 1866.

By affirming the decision below, the court of appeals adopted the view that "a §1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including proof of disparate impact alone" (see A 167).

While this Court has clearly established that a Title VII violation may be established by proof of either intentional discrimination or disparate impact, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), it has not yet decided the equally important and equally fundamental issue of whether proof of intentional discrimination is required to establish a violation of the Civil Rights Act of 1866 (now codified in 42 U.S.C. § 1981 and § 1982). Twice before, this Court has granted certiorari and heard argument on this question, *Davis* v. *County of Los Angeles*, 440 U.S. 625 (1979), and *City of Memphis* v. *Greene*, ____ U.S. ____, 49 U.S.L.W. 4389 (April 20, 1981); however, the Court disposed of both cases without squarely deciding the question. Once again, the issue is presented to the Court, and because conflict exists in the lower court decisions, Bechtel urges that its petition be granted.

A divergence of opinion on this issue exists among the circuit courts of appeals. Several, following this Court's opinion in *Washington* v. *Davis*, 426 U.S. 229 (1976), have held that proof of discriminatory intent is necessary to establish a violation of §1981. *Guardians Association* v. *Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980); *Mescall* v. *Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Williams* v. *DeKalb County*, 582 F.2d 2 (5th Cir. 1978); *Chicano Police Officers Ass'n* v. *Stover*, 552 F.2d 918 (10th Cir. 1977). The Court of Appeals for the District of Columbia Circuit has expressed a contrary view. *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977). The Ninth Circuit Court of Appeals also reached a contrary conclusion in *Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); but, since the vacating of *Davis*, a second panel of the court adopted the intent standard, *Craig* v. *County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1364 (1981). By its decision below, the Court of Appeals for the Third Circuit has expressed sufficient differences with its judicial counterparts to warrant this Court to again address this fundamental and recurring question.[5]

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5 Similar disagreement is evident among the district courts. Many have required proof of discriminatory intent to establish a claim under §1981. *Johnson* v. *Olin Corp.*, 484 F. Supp. 577 (S.D.Tex. 1980); *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, 488 F. Supp. 723 (D.N.J. 1980); *Williams* v. *City and County of San Francisco*, Nos. C-78-1312-SW and C-78-0171-SW (N.D.Cal. Sept. 26, 1979); *Louisville Black Police Officer's Organizations, Inc.* v. *City of Louisville*, 20 F.E.P. Cases 1195 (W.D.Ky. 1979); *Ball* v. *Ridgeway Enterprises, Inc.*, 478 F. Supp. 456, 461 (S.D. Tex. 1979); *Harris* v. *White*, 479 F. Supp. 996, 1002 (D. Mass. 1979); *Drayton* v. *City of St. Petersburg*, 477 F. Supp. 846, 855 (M.D. Fla. 1979); *Stewart* v. *Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979); *Rich* v. *Martin Marietta Corp.*

It is unnecessary for the Court to break new ground to resolve this narrow issue. All that is required is an explicit decision concerning what has been implicit in the Court's prior determinations. The Court has already traced the legislative lineage of § 1981 to the equal protection principles of the Fourteenth Amendment, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and has decreed that the Fourteenth Amendment is violated only by acts of intentional discrimination, *Washington* v. *Davis*, 426 U.S. 229 (1976).

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5 (Footnote cont'd.):

467 F. Supp. 587, 617 (D. Colo. 1979); *Walker* v. *Robbins Hose Co. No. 1, Inc.*, 465 F. Supp. 1023, 1044 (D. Del. 1979) (dictum); *Flora* v. *Moore*, 461 F. Supp. 1104, 1116 (N.D. Miss. 1978); *Stewart* v. *City of Pontotoc, Mississippi*, 461 F. Supp. 767, 777 (N.D. Miss. 1978); *National Organization for Women* v. *Waterfront Commission of New York*, 460 F. Supp. 84, 87 (S.D. N.Y. 1978); *United States* v. *City of Buffalo*, 457 F. Supp. 612, 618 (W.D.N.Y. 1978) (dictum); *Queen* v. *Dresser Industries, Inc.*, 456 F. Supp. 257, 261 n.8 (D. Md. 1978) (dictum); *Arnold* v. *Ballard*, 448 F. Supp. 1025, 1027-28 (N.D. Ohio 1978); *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 964-966 (D. Md. 1977); *Ortiz* v. *Bach*, 14 F.E.P. Cases 1019, 1020 (D. Colo. 1977); *Johnson* v. *Hoffman*, 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd sub nom.*, *Johnson* v. *Alexander*, 572 F.2d 1223 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

However, several other district courts have adopted the view that liability can be imposed under §1981 without proof of discriminatory intent. *Guteirrez* v. *Aero Mayflower Transit Co.*, 22 F.E.P. Cases 447 (N.D. Cal. 1979); *Movement for Opportunity* v. *Detroit Diesel*, 18 F.E.P. Cases 557 (S.D. Ind. 1978); *Randolph* v. *U.S. Elevator Corp.*, 452 F. Supp. 1120, 1124 (S.D. Fla. 1978); *Dawson* v. *Pastrick*, 441 F. Supp. 133 (N.D. Ind. 1977), *rev'd in part on other grounds*, 600 F.2d 70 (7th Cir. 1979) (no discussion of *Washington* v. *Davis*). *See also Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1264 (D. Conn. 1979); *Winston* v. *Smithsonian Science Information Exchange Inc.*, 437 F. Supp. 456 (D.D.C. 1977) (dictum).

Moreover, in confirming that the proscriptions of the 1866 Act extend to private, as well as state action, this Court has characterized the private action so proscribed as that which is motivated by discriminatory intent. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (§ 1982); *Runyon* v. *McCrary*, 427 U.S. 160, 170-171 (1976) (§ 1981). Finally, and significant in view of the district court's identical treatment of Title VII and § 1981, this Court has established that § 1981 is "separate, distinct, and independent" from Title VII. *Johnson* v. *Railway Express Agency, Inc., supra*, at 461.

The decision below is in conflict with these prior Supreme Court decisions. It presents an opportunity to establish the evidentiary standard for measuring claims of discrimination brought under the 1866 Act and to resolve, once and for all, the conflict which now exists among the lower courts.

II. THE COURTS BELOW ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN DETERMING THAT THE DEFENDANT-EMPLOYER CLASS COULD BE FOUND VICARIOUSLY LIABLE UNDER §1981.

The error in the district court's vicarious liability finding is evident when tested by the proper touchstone of a valid claim under §1981, namely, the discriminatory intent of the party held liable. Intent, being a state of mind, is necessarily personal. Thus, to impute intent to one individual from the acts of another defies logic as well as established legal concepts.

Aside from its inconsistency with the concept of intent, the court's reasoning is not supported by the authorities upon which it relied. Those authorities fall into three categories: employment descrimination cases, decisions under the National Labor Relations Act ("NLRA"), and the common law doctrine of *respondeat superior*.

A. Imposition of Vicarious Liability Is in Conflict with Prior Employment Discrimination Cases.

Few employment discrimination cases have addressed the issue of an employer's liability for racial discrimination in the hiring hall context. But where the issue has been confronted, the courts have uniformly determined that employers or their associations are not liable for a union's independent acts of discrimination in a hiring hall operation. *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E.D. La. 1968), *aff'd sub nom. Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Allen* v. *Pipefitters Local Union No. 208*, 58 F.R.D. 473 (D. Colo. 1972); *McFadden* v. *Baltimore Steamship Trade Association*, 8 F.E.P. Cases 391 (D. Md. 1972).

The district court found these cases "unpersuasive" (A 174). Instead, it relied upon a group of decisions wherein a single employer and a union had negotiated a collective bargaining agreement with facially neutral seniority provisions which, when applied as written by the parties, had a disproportionately adverse impact on minorities (A 182).[6] In these cases, the courts generally found that the seniority provisions in the parties' agreements contravened Title VII, and both the union and the employer were held liable. On this point, the cited cases are now of doubtful authority, following this Court's delineation of *bona fide* seniority systems in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). The district court nevertheless considered these earlier cases sound support for the two principles which ultimately formed the basis of its theory of class-wide vicarious liability.

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6 *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

First, the court read these employment discrimination cases as establishing the principle that employers have an " 'affirmative duty' to prevent discrimination" (A 186). This holding is contrary to this Court's pronouncement in *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978) that an employer's duty is merely to refrain from engaging in discrimination. Thus, the district court's holding is in conflict with this prior holding of the Court.

The district court also considered these employment discrimination cases as authority for the principle that an employer can be held liable solely because a collective bargaining agreement which it negotiates has a discriminatory impact on the employer's workforce (A 183). In applying this principle, the court erred twice. First, it failed to distinguish between a labor agreement which may be unlawful because it necessarily has adverse impact when applied as written by the parties, and a labor agreement which is neutral when applied as written by the parties and has an adverse impact only when misapplied by one party without the knowledge of the other. To hold both parties liable in the latter situation ignores the requirement that proof of discriminatory intent is a prerequisite to liability under §1981.

The court's second error was expanding the principle of the prior cases to find not one, but 1400, individual employers liable on the basis of literally hundreds of bargaining relationships and labor contracts, without regard to whether these agreements actually had an adverse impact on each employer's workforce. This theory of absolute vicarious liability cannot be reconciled with this Court's holding in *International Brotherhood of Teamsters, supra*, at 336, that a plaintiff in an employment discrimination class action must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure." It is also contrary to the principles enunciated in *Furnco, supra*.

B. The NLRA Cases Are in Conflict with and Do Not Support the Decisions Below.

The district court also relied upon three circuit court decisions wherein orders of the National Labor Relations Board were enforced. *NLRB* v. *H. K. Ferguson Co.*, 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965); *Morrison-Knudsen Co., Inc.* v. *NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *NLRB* v. *United States Steel Corp.*, 278 F.2d 896 (3d Cir. 1960) (*en banc*), *cert. denied*, 366 U.S. 908 (1961) (A 169). In each case, the union had discriminated in work referrals on the basis of union membership. In each, the employer whose workforce was affected by the union's action was held liable for a violation of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). The district court concluded from these decisions that under the NLRA, employers are liable for a union's acts of discrimination regardless of whether the employer knew or should have known of such discrimination, and further concluded that the same rule should govern an employer's liability under § 1981.

Bechtel submits that the court erred in its interpretation of these NLRA cases. In *Morrison-Knudsen*, the court of appeals stated that the employer clearly had some knowledge of the union's discriminatory acts, 275 F.2d at 917; in *H. K. Ferguson*, the employer's unlawful activity was the "condoning or acquiescing in [the union's conduct]", 337 F.2d at 208; and in *United States Steel*, one of the employer's supervisory employees was instrumental in the unlawful activity, 278 F. 2d at 898. Thus, in no case was liability imposed on an employer who had no knowledge, direct or imputed, of the union's actions. Furthermore, at least two courts of appeals have expressly rejected the vicarious liability theory in the NLRA context. *NLRB* v. *Master Stevedores Association of Texas*, 418 F. 2d 140 (5th Cir. 1969); *Lummus Co.* v. *NLRB*, 339 F.2d 728 (D.C. Cir. 1964). The decisions below are clearly in conflict with these latter two decisions, and, when the findings in the record are examined, are actually in conflict with the three cases expressly relied upon.

C. The Common Law Doctrine of *Respondeat Superior* Should Not Be Applied in the Circumstances of this Case.

The district court's application of the doctrine of *respondeat superior* is also in error. Plainly, the court failed to recognize the legal and *de facto* relationships between employers and unions when it declared the Union to be the agent, indeed the servant, of the defendant-employer class. In common law, of course, the *sine qua non* of such a relationship is the existence of a right of control by the master (employers) over the acts of the servant (union). Understandably, there is no recitation in the decisions below of any basis for finding a right of control. The contention that a union is the servant of the employer with which it negotiates runs counter to the entire thrust of the NLRA, the purpose of which is to insure the right of employees to form labor organizations independent of employer influence, much less control. Plainly, the court's reliance upon *respondeat superior* ignores the legal and economic balance of power created by Congress in the NLRA and the total independence of organized labor from management domination.

Perhaps recognizing this, the district court endeavored to by-pass the "control" requirement with its conclusion that the employers had some affirmative nondelegable duty under §1981. Again, this reasoning is in conflict with this Court's holding in *Furnco, supra.*

III. THE COURTS BELOW ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW BY CREATING A NOVEL AND EXTRAORDINARY STANDARD OF LIABILITY UNDER § 1981 WHEREBY AN EMPLOYER MAY BE HELD LIABLE WITHOUT EVIDENCE OF EITHER DISCRIMINATORY INTENT OR DISCRIMINATORY IMPACT ON ITS WORKFORCE.

Under the case law prevailing prior to the decision below, it was uniformly recognized that § 1981 required a standard of proof either greater than, or equivalent to, that required under Title VII. Thus, as described earlier herein, the prevailing view was that § 1981 required a showing of purposeful discrimination, whereas Title VII afforded protection to discriminatees on a disparate impact theory, even in the absence of intent. The contrary view was that a violation of § 1981, like Title VII, required at least a showing of disparate impact, but no more. Yet, in the present case, Bechtel has been found guilty of a violation of § 1981 and subjected to a comprehensive mandatory injunction without any finding that it either purposefully discriminated or that its use of Local 542's hiring hall, in fact, caused any disparate impact on its own workforce.

We urge the Court to reflect upon the magnitude of the quantum leap taken in the decisions below. Under the classwide vicarious liability theory applied by the district court, a violation of § 1981 occurs even where:

> (1) an individual contractor does not know, and could not have known, of the discriminatory operation of a union hiring hall, use of which is required by a facially neutral provision of a labor contract; and
>
> (2) the discriminatory hiring hall does not, in fact, result in racial imbalance of that employer's own work force.

An employer who hired but a single operating engineer through the Local 542 hiring hall during the period from 1965 to 1978 thereby became a member of the defendant-employer class. Under the decision of the district court, such an employer is personally liable under § 1981 for compliance with the broad restraints of the injunction, even if the single employee hired was a black.[7]

Thus, the decisions below expand § 1981 to the point where proof of *neither* intent *nor* disparate impact is required. Bechtel was found liable under § 1981 not because it engaged in purposeful discrimination, nor because its workforce was shown to be adversely affected, but simply because Bechtel used a hiring hall which adversely affected a universe comprised of 1,399 other companies considered as an aggregate.

This is far beyond where any court as ventured in its interpretation of § 1981. In fact, it is far beyond where any court has ventured in its interpretation of Title VII. This Court's decisions in *Teamsters, supra*, and *Furnco, supra*, make it clear that an employer is only liable under Title VII if a plaintiff can demonstrate that discrimination has occurred in some fashion in that employer's workforce. The decisions below dispense with this requirement. In so doing, they redefine § 1981 as a statute imposing not a higher standard of proof than that required by Title VII, or even an equivalent standard, but one that imposes a lesser standard of proof than that required by Title VII.

No other circuit court has reached such a conclusion.

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7 This hypothetical is very nearly matched by reality. One employer, Barger, Inc., was denied summary judgment and subjected to the Decree despite uncontradicted evidence that minorities constituted at least 50% of its workforce at all relevant times.

IV. THE DECISIONS OF THE COURTS BELOW JEOPARDIZE THE STABILITY OF COLLECTIVE BARGAINING THROUGHOUT THE CONSTRUCTION INDUSTRY AND THEREFORE MERIT REVIEW BY THIS COURT.

The result of the district court's holding is that a contractor who utilizes a union hiring hall violates § 1981 if that union intentionally discriminates in its referrals, without regard to whether the contractor knew, or should have known, of the discrimination being practiced by the union, and without regard to whether the contractor's own workforce is adversely affected by the discrimination. Simply put, the contractor by merely using the hiring hall, becomes its guarantor and is *per se* liable for discriminatory union referrals from the hiring hall.

Bechtel is a national contractor employing thousands of union craftsmen at various projects throughout the United States. As such, it has national collective bargaining agreements with the International Unions of virtually all of the building trades. These contracts are negotiated at the International level and typically require that Bechtel use, sight unseen, the hiring hall of the International's affiliated local union having jurisdiction over the site of each Bechtel construction project throughout the country.

Under prevailing legal principles, if Bechtel were shown to have agreed to use a hiring hall operated by a local union which Bechtel knew to be discriminatory, imposition of liability under § 1981 would be foreseeable. If it were shown that Bechtel's workforce at a particular jobsite displayed a significant underutilization of minorities, Bechtel might appropriately be charged with notice of discrimination by the local union, likewise justifying the imposition of liability under § 1981. But it is neither just nor reasonable to hold Bechtel liable because

a union discriminates and thereby adversely affects the workforce of another employer, or of the universe of several hundred employers which operate in the vicinity of each Bechtel jobsite. Yet, this is the result of the decisions below.

If the lower court decisions represent the law of the land, the only way for Bechtel to protect itself from liability for countless unknown union violations of § 1981 is to attempt to negotiate the deletion of hiring hall provisions from its national agreements and to resist such provisions in each locality where it is engaged. Bechtel's situation is not unique. Indeed, every contractor, large or small, that has an exclusive hiring hall clause in its labor agreement faces the same dilemma.[8]

Employers must now reassess their collective bargaining agreements in view of the incalculable potential liability those agreements represent under the rule of law created by the courts below.[9] Yet, it can safely be predicted that any effort by employers to negotiate the deletion of hiring hall provisions from collective bargaining agreements will be steadfastly resisted by the construction trade unions. The risk of widespread disruption of labor relations in the construction industry, at odds with our national labor policy of promoting peaceful collective bargaining, is sufficient reason for this Court to carefully scrutinize the decisions below.

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8 Some 40 national agreements and 6,000 local agreements currently are in effect in the construction industry. U.S. Department of Labor, "Annual Construction Industry Report, April 1981", p. 12.

9 A second bilateral class action lawsuit is now pending in the Eastern District of Pennsylvania. That action, filed on behalf of a separate plaintiff class by the attorneys for plaintiffs in this action, alleges discrimination in the operation of the hiring hall of another construction trade union, the Ironworkers.

V. THE DECISIONS BELOW RAISE SERIOUS QUESTIONS CONCERNING THE USE OF DEFENDANT CLASS ACTIONS WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

A. Certification of the Defendant Class Was Contrary to Principles Established in Prior Decisions of this Court, and in Conflict with Another Circuit Court.

Before class certification is justified, a proposed class action must satisfy all four requirements of Rule 23(a), and one of the three alternative requirements of Rule 23(b). *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Here, the court erred in concluding that the requirements of Rule 23(a) were met, and further erred in certifying the class pursuant to subdivision (2) of Rule 23(b).

If evidence of discriminatory intent is necessary to establish a violation of § 1981, then, without question, certification of the defendant class was erroneous. Intent is an inherently subjective, and therefore individual, matter. The court below recognized this in dismissing plaintiff's conspiracy claim under § 1985(3) (A 197). Whether employer "A" had the requisite discriminatory intent is not a question in "common" with whether employer "B" had the same requisite intent. See *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Thus, the requirement of subdivision (a)(2) of Rule 23 that there be questions of law or fact common to the class was not satisfied in this case.

It is also apparent from the diverse structure of the construction industry, particularly the multiplicity of collective

bargaining relationships, that the claims and defenses of 1400 contractors will be neither "common" nor "typical." Individual questions of fact abound. Two questions of fact obviously not "common" to each member of the defendant class are (1) whether an individual employer's hiring practice were discriminatory, and (2) what impact these practices had on that employer's individual workforce. As stated above, imposition of liability without consideration of such evidence is contrary to the principles expressed in *Teamsters, supra,* and *Furnco, supra.* The need to consider such individualized information renders erroneous as a matter of law the certification of a defendant class under the circumstances of this case.

The court's certification of the defendant class under subdivision (b) (2) of Rule 23 was also improper. While it appears that certification of a *plaintiff* class under subdivision (b) (2) is appropriate in discrimination suits, few courts have carefully addressed whether (b) (2) certification is appropriate for a *defendant* class. It is evident from a plain reading of subdivision (b) (2) that it was not intended to govern defendant class actions; and for this reason, the Fourth Circuit Court of Appeals recently concluded that certification of a defendant class under subdivision (b) (2) is *not* appropriate, *Paxman* v. *Campbell,* 612 F.2d 848 (4th Cir. 1980) (en banc); *see also Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126, 140, n.28 (7th Cir. 1974); 7A Wright & Miller, *Federal Practice & Procedure,* 1775, at 21-22; 3B J. Moore, *Federal Practice,* 23.40[b], at 23-310. One reason for preferring such a result is illustrated by this case. Whereas the discretionary notice permitted under subdivision (b) (2) proved insufficient in this case to alert all class members to the pending adjudication of their rights, the mandatory notice and opt-out procedures of subdivision (b) (3) would more adequately protect the important due process interests of the absent class members.

B. The Exercise of Personal Jurisdiction over Defendant Class Members Is a Denial of Due Process of Law.

No unnamed member of the defendant employer class was served with a summons or complaint. Employers who first used the Local 542 hiring hall after 1973 did not receive notice of the lawsuit, although, because of this use, they became defendant class members and were subsequently held liable. At the close of trial, each member of the defendant employer class was required to comply with the terms of a mandatory injunctive decree, to be in effect until August 31, 1985. Each employer class member, of course, is subject to personal liability for failure to comply with its terms.

This imposition of personal liability upon absent class members violates the fundamental principle of Anglo-American jurisprudence that a court can not adjudicate a personal obligation unless the person to be held liable is served with process and brought before the court as a party. *See Zenith Corporation* v. *Hazeltine*, 395 U.S. 100 (1969). The procedural device of a class action does not expand the jurisdiction of the federal courts, nor can it override the constitutional due process considerations which underlie this principle. *Christopher* v. *Brusselback*, 302 U.S. 500 (1938).

To support its imposition of mandatory injunctive obligations on absent class members, the court relied upon *Hansberry* v. *Lee*, 311 U.S. 32 (1940). In our view, *Hansberry* supports Bechtel's position. There, the Court held that while absent defendants might be "bound" in the sense of *"res judicata"* by a judgment rendered in their absence, the petitioners before it were not so bound because the prior proceedings failed to satisfy the requirements of due process. The Court's reference to the *res judicata* effect of the prior determination defines the limits of a defendant class action. Here, for example, individual class members might be bound by the district court's finding that the Union engaged in intentional discrimination, and, if upheld, its conclusion of law concerning vicarious

liability; these could not be relitigated by defendant class members. However, an individual class member may not be subjected to a sweeping and onerous mandatory injunction until the court acquires personal jurisdiction over it and it is afforded a hearing on such matters as its membership in the class and any unique personal defenses that it may have, such as a racially balanced workforce.

Defendant class actions are no longer a rarity. The misuse of the procedural class action device as a sweeping remedial shortcut, without regard for due process protections, should not be fostered. The Court should accept this opportunity to speak directly on the appropriate scope of defendant class actions, and the protections to which defendant class members are entitled.

CONCLUSION

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

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Respectfully submitted,

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